

**United States Department of Labor
Employees' Compensation Appeals Board**

D.W., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 15-1819
Issued: April 5, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 2, 2015 appellant filed a timely appeal from the June 15, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant is entitled to an additional schedule award for his right upper extremity.

FACTUAL HISTORY

On January 26, 2011 appellant, a 49-year-old production shop planner (general), sustained a traumatic injury in the performance of duty while lifting a valve from a pallet to a cart. OWCP accepted his claim for right shoulder sprain and late effect of right tendon injury.

¹ 5 U.S.C. § 8101 *et seq.*

On June 29, 2011 appellant underwent arthroscopic surgery for right rotator cuff repair, subacromial decompression, and glenohumeral joint debridement of superior labral tearing. On November 26, 2012 he underwent a revision right rotator cuff repair and lysis of adhesions.

Appellant filed a claim for a schedule award (Form CA-7). Dr. Michael S. McManus, the attending physician Board-certified in occupational medicine, evaluated appellant's impairment. He found an eight percent impairment of the right upper extremity, using the diagnosis-based impairment (DBI) method due to a full-thickness rotator cuff tear (seven percent) and ruptured proximal biceps tendon with residual loss of elbow function (one percent).

An OWCP medical adviser found that appellant had 12 percent right upper extremity permanent impairment under the range of motion (ROM) method of evaluating the shoulder.

OWCP notified appellant that his physician should prepare an impairment rating for the entire right arm, including the conditions accepted under a prior claim.²

After discussing the matter with Dr. McManus, appellant declined to have a new rating.

In a decision dated August 8, 2014, OWCP denied any additional schedule award due to the accepted right shoulder injury. OWCP found that a complete and accurate impairment assessment, including an impairment rating for the right shoulder and right wrist conditions accepted under appellant's two claims, had not been provided.

During a hearing before an OWCP hearing representative, appellant's then-counsel argued that a reexamination of the wrist was unnecessary. He argued that OWCP should combine the current 12 percent permanent impairment with the previous 14 percent, using the Combined Values Chart, and then subtract the 14 percent previously paid.

In a decision dated June 15, 2015, OWCP's hearing representative affirmed the denial of an additional schedule award. The hearing representative found no basis for OWCP to use evidence from 2001 to determine appellant's current impairment, "as we have no evidence that that impairment continues or is at the same level as previously awarded."

On appeal appellant argues that OWCP did not explain why it could not use the Combined Values Chart to determine the total impairment.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.³ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of

² Under OWCP File No. xxxxxx038, appellant had previously received a schedule award on May 25, 2001 for 14 percent permanent impairment of his right upper extremity due to carpal tunnel syndrome. This rating was determined under the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (1993), OWCP found an 11 percent permanent impairment of the right upper extremity due to median nerve sensory deficit and 3 percent impairment due to median nerve motor deficit.

³ See 20 C.F.R. §§ 1.1-1.4.

use of specified members, functions, and organs of the body.⁴ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁵

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*.” The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁶ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁷

ANALYSIS

The issue on appeal is whether appellant is entitled to an additional schedule award for his right upper extremity.

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodologies when assessing the extent of permanent impairment for schedule award purposes.⁸ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.⁹ In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has

⁴ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

⁵ 20 C.F.R. § 10.404. *See also* Ronald R. Kraynak, 53 ECAB 130 (2001).

⁶ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, Schedule Awards, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁷ *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

⁹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodologies. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.¹⁰

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the June 15, 2015 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 5, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ *Supra* note 8.